Supreme Court, U.S.
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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1999

WILKIE MELLOTT, BONNIE MELLOTT
KIRK MELLOTT, MICHELLE HOLLENSHEAD
AND JACKIE WRIGHT

Petitioners

vs.

DON HEEMER; DAVID SEICH; PAUL HARDY;
MICHAEL REGAN; UNITED STATES OF AMERICA

Respondents

On Petition for Writ of Certiorari to the
United States Court of
Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI
Supplemental Appendix

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EDITOR'S NOTE

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILKIE MELLOTT, BONNIE MELLOTT, KIRK MELLOTT, MICHELLE HOLLINSHEAD, AND JACKIE WRIGHT,	)	CIVIL ACTION No. 1:CV-94-2071
Plaintiffs	)	
vs	)	
DON HEEMER, DAVID SEICH, PAUL HARDY, AND MICHAEL REGAN, INDIVIDUALLY AND THE UNITED STATES OF AMERICA	)	
Defendants	)	

Samuel C. Stretton, Esquire, of West Chester, Pennsylvania, and Don Bailey, Esquire, of Harrisburg, Pennsylvania, attorneys for plaintiffs.

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MEMORANDUM OPINION

Dated: 7/23/97
Wilmington, Delaware

Sue L. Robinson
ROBINSON, District Judge.

I. INTRODUCTION

Plaintiffs Bonnie and Wilkie Mellott are the former owners of three farms that were sold on November 7, 1992 at a public sale pursuant to the order of a U.S. Bankruptcy Court (D.I. 13 at paragraph 15; D.I. 57 at A44-A46) Bonnie and Wilkie Mellott were living on one of the three farms when they were evicted on January 21, 1993 pursuant to court order. (D.I. 13 at paragraph 15) Their son, plaintiff Kirk Mellott, lived on another of the farms, from which he too was evicted. (D.I. at paragraph 49) Plaintiff Michelle Hollinshead, a radio reporter, was present at Bonnie and Wilkie Mellott's residence on the day of the eviction for the purpose of reporting on their departure. (D.I. 13 at paragraph 57) Plaintiff Jackie Wright, a friend of the Mellotts, had arrived at Bonnie and Wilkie Mellott's residence on the morning of January 21 at their request to help them move. (D.I. 13 at paragraph 71-72)

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1. This case was reassigned after the judges of the United States District Court for the Middle District of Pennsylvania recused themselves due to their personal familiarity with defendants. (Docket Items ("D.I.") 12, 16, 20, 24, 27)

Plaintiffs filed their amended complaint pursuant to 28 U.S.C. §1331 and Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) on January 23, 1995, charging that the four individual defendants, all of whom are deputy United States Marshals ("deputy marshals"), violated plaintiffs' First, Fourth, and Fifth Amendment rights in the course of a court-ordered eviction. (D.I. 13) Plaintiffs also allege that the individual defendants conspired among themselves and with several co-conspirators not named as defendants in the complaint to intimidate plaintiffs and to punish them for publicly voicing their opposition to the process by which the Mellotts' land was taken from them. (D.I. 13) in addition to their federal claims, plaintiffs have articulated pendent state law claims for intentional infliction of mental distress, assault and civil conspiracy to assault.

Presently before this court is the defendants' motion for summary judgement. (D.I. 55) For the reasons stated below, the court will grant the motion in part and deny it in part.

II. BACKGROUND

A. Procedural History

Plaintiffs first attempted to recover for the alleged constitutional violations they suffered in connection with the Mellott's eviction in May 1994.

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2 On September 25, 1996 the court ordered that the United States be substituted as the defendant on plaintiffs' state law claims.(D.I.49)

In a suit filed against the Federal Land Bank of Baltimore, York Farm Credit Service ("York Farm Credit"), York Farm Credit employee Edward Heindel, and four unnamed federal marshals, plaintiffs alleged that defendants had deprived them of their rights under the First, Fourth, and Fifth Amendments. Mellott v. Heindel, No. 4 CV-94-0716 (M.D. Pa. Oct 31, 1994). The court dismissed the claims against the two banks and Heindel on the basis that they were strictly private parties. As to the federal marshals, the court dismissed the complaint on October 31, 1994 for lack of personal jurisdiction, due to plaintiffs' failure to serve the John Doe defendants. Id. The court denied plaintiffs' request to extend the time for service, concluding that the U.S. Marshals Service had not "stonewalled" as plaintiffs contended, but had merely declined plaintiffs' informal request for an investigation and suggested that plaintiffs file a Freedom of Information Act request for the marshals' names, which plaintiffs did not do. Id.

Plaintiff instituted the present action on December 23, 1994, naming defendant Heemer and three John Does as defendants. (D.I. 1) In interrogatories served along with the complaint, plaintiffs asked defendant Heemer to identify the other deputy marshals who had been involved in the incidents of which plaintiffs complained. On plaintiffs' motion, the court compelled defendant Heemer to answer the interrogatories before the expiration of the limitations period (D.I. 8) On January 23, 1995, plaintiffs amended their complaint, naming Deputy Marshals Seich, Hardy, and Regan in place of the John Doe defendants. (D.I. 13)

On May 7, 1997, after completion of discovery, defendants filed the instant motion for summary judgement. (D.I.55)

B. Factual Background

Plaintiffs Bonnie and Wilkie Mellott owned two parcels of land of which they operated a dairy farm. The couple resided on one of the parcels, the "home farm," and their son, Kirk Mellott, resided on the other, the "mountain farm." D.I. 56 at 5; D.I. 62 at 6) In the early 1980's, the couple borrowed money from the Farmers Home Administration ("FmHA") and the Farm Credit Bank of Baltimore ("Farm Credit Bank") to purchase a third, 53 acre farm known as the "Anderson farm." (D.I. 58 at A308-09) The purchase was secured by an $80,000.00 purchase money mortgage on the Anderson farm. Around the same time period, the Mellotts borrowed money to increase their herd, update and purchase new equipment, rewire their home, purchase feed, and finance other operating expenses. (D.I. 58 at A308-11; D.I. 63 at B12-15) According to Bonnie Mellott, FmHA pressured them into borrowing more money than they needed or could repay, (D.I. 58 at A310) By 1989, the Mellotts had fallen far behind in their payments and were deeply in debt. On January 25, 1989, Bonnie and Wilkie Mellott filed a voluntary petition for bankruptcy under Chapter 12 of the Bankruptcy Code. (D.I. 57 at A5)

On November 27, 1991, pursuant to an agreement between the Mellotts and their creditors, the bankruptcy court lifted the automatic stay as to Farm Credit Bank and permitted the bank to foreclose its mortgage on the Mellotts' land. According to the agreement, the Mellotts had until May 31, 1992 to sell the Anderson farm. If they did not do

so, the farm would be sold at public auction by June 30, 1992. In the event that the proceeds from the sale of the Anderson farm did not fully satisfy the debt owed to the Farm Credit Bank, the Mellotts were to sell off a second parcel by July 31, 1992. Any remaining balance was to be paid by the sale of any remaining property of the Mellotts on which the bank held a mortgage. (D.I. 57 at A34-37) According to Bonnie Mellott's deposition testimony, the Mellotts attempted to sell the two parcels, but the prospective buyer was warned off the sale by Mr. Heindel at York Farm Credit. (D.I. 63 at B21) Whatever the reasons, by November 1992 the farms had not yet been sold. A public auction was scheduled for November 7, 1992, at which all three of the Mellotts' farms were sold to local farmers. (D.I. 57 at A44-46) Shortly after the sale, the Mellotts received notice to vacate the property. (D.I. 58 A313).

According to defendants, the purchaser of one of the tracts of land sold at auction attempted to enter the property on November 9, 1992. As detailed in a motion submitted to the bankruptcy court on November 13, 1992 by the Farm Credit Bank, the Mellotts denied the purchaser access to the property in violation of the terms to which they had agreed. (D.I. 57 at A49) Plaintiffs deny that the new owners of the property attempted to enter the premises at any time after the sale but before the eviction. (D.I. 58 at A315; D.I. 63 at B70)

At around the same time as the sale of the farms, the Mellotts contend that they "were victimized by a con man named Rick Elliot who encouraged them (for money) to file numerous pro se federal complaints and

promised them that he could same their farms". (D.I. 13 at paragraph 17) Bonnie Mellott testified at her deposition that Elliott drew up the paperwork for a suit in federal district court against the FmHA, York Farm Credit, and several individuals, charging them with violating the bankruptcy order, fraud, conspiracy, and several other statutory violations. (D.I. 63 at B12) The court dismissed the Mellotts' suit on February 8, 1993, holding that claims pertaining to the bankruptcy order should have been raised in the bankruptcy court. Mellott v. York Farm Credit, CA No. 1:CV-92-1587 (M.D. Pa. Feb 8, 1993). As to the Mellotts' other allegations, the court noted the striking similarity to the allegations in an unrelated case (presumably also drafted by Rick Elliot) and dismissed on the same grounds. Although the court denied defendants' motion for sanctions, the memorandum decision included a sternly worded footnote:

> The captioned action is one of many that could have been considered a violation of Federal Rule of Civil Procedure 11. The decisions that have now been rendered by this court in this action and in Rosenberry et al. v. The Farm Credit Bank of Baltimore, et al... are adequate notice to potential plaintiffs and their ghost writer who contemplate filing actions containing the same frivolous allegations. Properly formed motions for sanctions in the future will be seriously considered.

Id. at 7, n2.

The record of the instant case also contains copies of other documents the Mellotts filed during the period following the

sale for the farms, including a "Notice of Lis Pendens," filed on November 23, 1992, and a "Notice of Rescission Against All Liens, Mortgages, Security, Agreements, and Notes," "dated the same day, in which the Mellotts claimed that the FmHA, the bank, and several individuals, including their own bankruptcy attorney, had engaged in fraud against them. (D.I. at A55-62) Bonnie Mellott has testified that although Elliot drafted the documents and accepted payment for them, his name did not appear on any of the pleadings. (D.I. 53 at B15) In addition to their legal filings, the Mellotts posted rather specific "No Trespassing" signs on their property:

> POSTED: I, being a natural individual person possessing sovereign immunity hereby give NOTICE that the Person, Corporeal, and Tangible Property (real or personal), All Air Space On and Above Ground, All Rights Below Ground, all of which I am Tenant, and Relative Rights are POSTED; and
> That Legal Notice is hereby given to Any and All including Agencies of the Federal, State, and County, Township, and City Governments and their Agents and Employees each and all of them;
>
> WARNING: You are hereby given NOTICE of the following Federal Law: 18 U.S.C. §241 and 242; 42 U.S.C. §1983, 1985, and 1986; 42 U.S. C. §1981, 1982 and 1994; and see Bivens v. 6 Unknown FB(I) Agents, 403 U.S. 388 (1971); and see 67 Calif Law Review No 6 (1979); see State Constitution and Criminal Laws of this State and Related Law Evidence as may apply;

and

NO TRESPASSING for any purpose by order of tenant; violators will be prosecuted.

(D.I. at A63) The notice was signed by Bonnie and Wilkie Mellott and dated November 23, 1992. Bonnie Mellott testified during her deposition that they obtained the signs from Rick Elliot. (D.I. 63 at B42) Also on Elliot's advice, Wilkie Mellott put up a chain to prevent access to the property. (D.I. 63 at B68-69).

On December 3, 1992, the Farm Credit Bank of Baltimore moved for an order of contempt against Bonnie and Wilkie Mellott due to their vexatious filings and refusal to vacate the property. (D.I. 57 at A64-67) A hearing on the motion was held in bankruptcy court on December 18, 1992. According to Bonnie Mellott, who was present at the hearing, the bankruptcy judge stated that farmers were idiots, that the Mellotts were wasting the court's time, that the district court was "sick and tried of frivolous lawsuits," and that the court would make an example of the Mellotts. Plaintiffs contend that the judge then ordered that his comments be stricken from the record. (D.I. 57 at A74-75; D.I. 63 at B44-46)

By order dated December 21, 1992, the bankruptcy court granted the bank's motion, declaring the notices filed by the Mellotts, and any future filings of similar nature, null and void and ordering them stricken from the records of the recorder of deeds. (D.I. 58 at A70-71) The court also declared the Mellotts to be in contempt of court, and ordered them

under penalty of incarceration and/or fine to vacate the premisses of the auctioned land by December 28, 1992. (D.I. 58 at A70) The Mellotts responded by filing a motion to vacate the judgement, a notice of appeal, a motion to disqualify the bankruptcy judge, and a notice of motion to stay. On December 31, 1992, the bankruptcy court denied the Mellotts' motions and signed a writ of assistance directing the U.S. Marshal to serve the Mellotts with a notice stating that all persons and personal property must be removed from the premises by January 5, 1993. (D.I. 57 at A78-81) According to the deposition testimony of defendants Heemer and Regan, the two defendant deputy marshals and a third deputy marshal not a party to this suit posted the notices at Bonnie and Wilkie Mellott's residence on December 31, 1992. The papers were also served on Kirk Mellott by defendant Regan and the third marshal while defendant Heemer remained in the car. (D.I. 57 at A125-27; D.I. 58 at A286-90) According to defendant Heemer, the other two deputy marshals reported that Kirk Mellott had accepted the papers but stated that the Mellotts had no intention of leaving the property. (D.I. 57 at A127)

On January 11, 1993, the bankruptcy judge signed a writ of assistance directing the U.S. Marshal "to secure the real property described in the attached description, remove all persons on the premises, insure the peaceable removal of all personal property from all improvements on the premises, and verify any inventory of personal property removed on January 14, 1993, or at a time agreed upon thereabout." (D.I. 57 at A84).

Upon receipt of the writ, Supervisory Deputy U.S. Marshal Byerts assigned defendant

Heemer to head the team of deputy marshals that would remove the Mellotts from the property. (D.I. 57 at A2-3) Byerts met with Heemer and advised him that the Mellotts might offer armed resistance to the eviction. He based his assessment on information he had received from several sources, including the bankruptcy court's request for extra security when the Mellotts were scheduled to appear in court; a report from an FmHA supervisor that Wilkie Mellott had chased him off the property with his truck, had brandished a handgun, and had threatened to shoot any federal agent that entered the premises; and Kirk Mellott's statement to the marshals who served him with the court's previous order that the family did not intend to leave the property. Byerts also informed Heemer that the Mellotts kept numerous firearms at their house and that Kirk Mellott was suffering from mental instability due to a recent head injury. (D.I. 57 at A3-4) Byerts authorized the deputy marshals executing the writ to carry a short shotgun and an AR-15 semiautomatic rifle and advised the use of bulletproof vests "because of the possibility that they would meet armed resistance." (D.I. 57 at A3)

3According to defendants, the execution of the writ was delayed until January 21 due to Wilkie Mellott's recent release from the hospital following angioplasty. (d.I. 56 at 7;D.I. 58 at A316)

4The Mellotts have confirmed that they kept several firearms in their home and that Wilkie Mellott often carried a pistol when he was out in the fields. (D.I. 58 at A339-40, A350-51)

On January 20, 1993, the Mellotts received a phone call from Steven Hovis, the attorney for the Farm Credit Bank, informing them that the deputy marshals would be arriving the following morning to remove them from the property. (D.I. 63 at B10).

On the morning of January 21, 1993, defendants met at the McConnellsburg Barracks with two state troopers and another deputy marshal not named in this suit in preparation for executing the writ of assistance. (D.I. 57 at A158, A161-62) Their plan was to arrive frist at Bonnie and Wilkie Mellotts residence. They would station one deputy marshal at the front of the house and one of the troopers at the rear "to keep anyone coming on the property as well as to provide...covering backup". (D.I. 57 at A153) The remainder of the deputy marshals and the other trooper were to go inside the house and "deal with the people that we will encounter at the house." (D.I. 57 at A155) Two of the deputy marshals were to assigned to "Sweep" the house.

5There is some disagreement among defendants as to the purpose of a sweep. According to defendant Heemer, the deputy marshals were to search only for other individuals who might be in the house. Thus, their search would encompass only those areas large enough to conceal a person. (D.I. 57 at A166) Defendant Seich, on the other and, asserted that the sweep was performed for their protection, and that the deputy marshals searched for weapons as well. (D.I. 57 at A220).

After removing anyone present from Bonnie and Wilkie Mellott's residence, the team would notify FmHA and a moving company designated to pack and store any personal belongings left on the property. (D.I. 57 at A158) They would then proceed to Kirk Mellott's residence and repeat the process.

Each member of the team carried a sidearm. (D.I. 57 at A159) In addition, defendant Seich was armed with a shotgun, and deputy marshal Gorman carried an AR-15 semiautomatic rifle as authorized by their supervisor. Robert Byerts. (D.I. 57 at A3) According to defendants, the deputy marshals wore casual clothing with bulletproof vests and raid jackets. The jackets, according to defendant Heemer, have a U.S. Marshals patch or logo on the front and the words "U.S. Marshal" in three inch lettering on the back. (D.I. 57 at A161) The state troopers were in uniform and drove in marked patrol cars. (D.I. 58 at A403;D.I. 57 at A228).

When the deputy marshals and state troopers arrived at Bonnie and Wilkie Mellott's residence, defendant Heemer approached the house and knocked on the front door. According to Bonnie Mellott, who answered the door, Heemer did not identify himself or his purpose, but entered the house with his gun drawn and stated, "I guess you know why we are here." (D.I. 58 at A300) As Bonnie Mellott testified at her deposition, "he had a gun on me. So he told me to sit down and I didn't sit down right away. He shoved me into the chair and kept the gun on me the whole time". (D.I. 58 at A300) Heemer, on the other hand, claims to have identified himself as a deputy marshal and explained that the team was there to evict the Mellotts. (D.I.

57 at A164 He claims also to have shown the Mellotts his badge and presented them with paperwork to sign. (D.I.58 at A164) He states that Bonnie Mellott sat down voluntarily when asked to do so.(D.I. 57 at A165) In response to Heemer's questions, the Mellotts reported that no one else was in the house, and that there were no firearms on the premises. (D.I. 166)

Defendants Seich followed immediately behind Heemer, carrying what both Bonnie and Wilkie Mellott and Jackie Wright described as a "sawed-off shotgun". (D.I. 58 at A300, A405) Bonnie Mellott testified that upon entering the house, defendant Seich "pumped a round into the barrel and pointed it (at) Wilkie and told him to sit still, not move and to keep his mouth shut". (D.I. 58 at A300) Both Heemer and Seich deny that Seich pumped a round into the chamber while inside the Mellott's residence. (D.I. 57 at A175, A216) One of the state troopers entered behind Seich followed by defendants Regan and Hardy, who proceeded to the kitchen. (D.I. 58 at A241, A263).

In the kitchen, plaintiff Hollinshead was on the telephone with the local sheriff. (D.I. 58 at A424) She had arrived at the Mellotts' residence at 8:15 that morning to cover the eviction for her radio station. (D.I. 58 at 422) One of the deputy marshals entered the kitchen and, according to Hollinshead, chambered a round in his semi-automatic handgun. (D.I. 58 at A424) The deputy marshal then allegedly put the gun to Hollinshead face, asked who she was talking to, and

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6Only one plaintiff, Michelle Hollinshead, recalls seeing the U.S. Marshals insignia. (D.I. 58 at A428)

ordered her to get off the telephone. Hollinshead identified herself to the deputy marshal and told the sheriff over the telephone that a deputy marshal was waving a gun in her face. The deputy marshal told her twice more to "shut the hell up and hang up the phone," at which point, Hollinshead testified, he put the gun to the back of her head, grabbed her by the arm, and ushered her out of the kitchen toward the front room. (D.I. 58 at A424, A430-32) Defendant Heemer claims to have entered the kitchen while two other deputy marshals were trying to get her to hang up the telephone. He testified at his deposition that "I explained to her that we were there for an eviction and she'd have to leave and she left". (D.I. 57 at A167) He did not report seeing any other marshal point a gun at her. Defendant Hardy, while

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7The amended complaint identifies defendant Hardy as the deputy marshals who encountered Hollinshead in the Mellott's kitchen. (D.I. 13 at paragraph 61-64) During her deposition and responses to interrogatories, however, Hollinshead states that Michael Regan, not Paul Hardy, had been in the kitchen with her (D.I. 58 at A421, A481) Later, in their response to defendants' request for admissions, plaintiffs again asserted that Hardy, not Regan was the deputy marshal who allegedly violated Hollinshead's constitutional rights. (D.I. 58 at A500) According to defendant Hardy's recollection, both he and Regan were in the kitchen while Hollinshead was on the telephone. Defendant Regan was the one who ordered her to put the phone down. (D.I. 58 at A242)

acknowledging that he and Regan may have had their weapons drawn at that point, denied that either he or Regan pointed a gun at Hollinshead. (D.I. 58 at A241-42) Regan also testified at his deposition that he and Hardy had their weapons drawn, and that he had a round in the chamber. (D.I. 58 at A263) He recalled asking Hollinshead three times to get off the telephone, the second and third times with his voice raised, but contends that he never touched her and that his gun was pointed at the floor the entire time. (D.I. 58 at A264-65, A269-70) According to defendant Heemer, if a deputy marshal had put a gun to Hollinshead's face or head, such behavior would have been "absolutely" inappropriate. (D.I. 57 at A212) Regan confirmed this view, stating, "I would have had hell to pay with Deputy Heemer if I'd have done any of those things." (D.I. 58 at A269)

According to defendant Hardy, after Hollinshead returned to the living room, he and Regan went upstairs to continue their sweep. (D.I. 58 at A245) While Hardy and Regan were upstairs, plaintiffs state that they heard "banging around". (D.I. 58 at A302) Plaintiffs claim that in performing their sweep, defendants ransacked the house:

> [E]verything was dumped, the drawers were dumped out, trash cans were upset, clothes were throw out of closets, the bed mattress was off, that was upstairs. Downstairs they took the cushions off the couch, pulled the desk drawers out... My kitchen cupboards were emptied, pans and lids and silver. Some of my good china, several

pieces of it broken and I had some collector's crystals, part of that was broken.

(D.I. 58 at A317) Plaintiff Hollinshead also noted that the house had been ransacked, "like they looked in every little nook and cranny". (D.I. 58 at A448) She also noted that kitchen drawers had been dumped out and chair cushions pulled up. (D.I. 58 at A448-49) During his deposition, defendant Seich testified that he walked through every room in the Mellott's house, presumably after the initial sweep was performed. He acknowledged that the house appeared somewhat disordered. (D.I. 57 at A225) Defendant Heemer, who also saw the upstairs of the house, described it as "disheveled." (D.I. 57 at A209) Defendant Hardy contends that the Mellotts' residence was "short of being a pigsty . . . a mess" before the deputy marshals even entered. He remembers clothes being strewn about and stated that he and Regan had to move piles of the Mellotts' belongings to perform their search. (D.I. 58 at A249) He also claims that he and Regan looked in closets and under beds, but not in any drawers when performing their sweep. (D.I. 58 at A246) Regan confirmed Hardy's statements. (D.I. 58 at A273-74, A277)

At some point during the sweep of the house, Wilkie Mellott, who had recently undergone angioplasty, said that he felt ill and requested his medication. According to Bonnie Mellott, when she rose to get the medication, defendant Heemer shoved her back into her chair and asked her where the medication was. Heemer then picked up the medicine from the counter Bonnie Mellott had indicated and brought it to Wilkie Mellott. (D.I. 58 at A301-02) When questioned as to

whether there was any delay in her husband's obtaining his medication, Bonnie Mellott acknowledged that it did not take very long for Heemer to retrieve the bottle and hand it to Wilkie Mellott. (D.I. 58 at A322) At his deposition, Heemer denied that he or any other defendant at any point pushed Bonnie Mellott down into a chair. (D.I. 57 at A179) Defendant Seich corroborated Heemer's recollection. (D.I. 57 at A229)

After the deputy marshals had completed their sweep of the house, defendant Heemer reportedly told Bonnie Mellott that she could go upstairs and pack a change of clothes and toiletries for herself and her husband. Defendant Seich accompanied her upstairs. (D.I. 58 at A303) Defendant Seich testified at his deposition that he advised Bonnie Mellott to take with her any valuables and any objects that had sentimental value. (D.I. 57 at A227) Bonnie Mellott denies this assertion. (D.I. 58 at A305)

When Bonnie Mellott and defendant Seich returned downstairs, defendant Heemer asked her how they knew that the deputy marshals would be arriving that day. Bonnie Mellott explained that Mr. Hovis had called the previous evening, at which point Heemer allegedly muttered to defendant Seich, "That son of a bitch Heindel can do his own dirty work from now on." (D.I. 58 at A304) The deputy marshals then led Bonnie and Wilkie Mellott, Jackie Wright, and Michelle Hollinshead out of the house. Heemer directed the Mellotts not to return to the property and informed them that any return would be considered trespassing. (D.I. 57 at A170) He denies telling the Mellotts that they would be shot if they returned. (D.I. 57 at A183)

Outside, the deputy marshals helped the Mellotts load some of their belongings into their vehicles and discussed the second stage of their plan, which involved removing Kirk Mellott from the mountain farm. Overhearing their conversation, and concerned about her son's state of mind due to his recent head injury, Bonnie Mellott offered to accompany the deputy marshals to the mountain farm. (D.I. 58 at A304) The deputy marshals rejected her offer, but agreed to let Jackie Wright come with them. (D.I. 58 at A305, A440, A406)

Jackie Wright drove up to the mountain farm in his own vehicle, followed by the deputy marshals and troopers. (D.I. 57 at A170) When they arrived at Kirk Mellott's house, one of the deputy marshals motioned Wright over to his car. According to Wright, the deputy marshal told him that Wright would proceed first into the house, and that "if anything goes wrong in here you're going to be the first one to go down." (D.I. 58 at 408) Defendant Heemer denies making a comment of this nature. (D.I. 57 at A187) Wright also contends that as he led the deputy marshals up the path to the house, he felt a gun pointed at his back. (D.I. 58 at A408) Defendant Heemer acknowledges that he may have had his weapon drawn at this point. (D.I. 57 at A185) Wright entered the house without knocking, and found Kirk Mellott sitting in his living room with a bag full of his belongings. (D.I. 58 at A412-13) According to the deposition testimony of both Wright and Kirk Mellott, defendant Heemer entered behind Wright with his gun drawn, pushed Kirk Mellott against a wall and frisked him. (D.I. at A358, A366-68, A370, A413) The deputy marshals then allegedly ransacked the house, knocking objects from

chairs and upending the boxes that Kirk Mellott had been packing. (D.I. 58 at A372-73) Wright also stated that the deputy marshals dumped out the bag containing Kirk Mellott's clothes and searched through it. (D.I. 58 at A414) Heemer confirms that one of the other deputy marshals emptied the bag and searched it. (D.I. 57 at A188) The deputy marshals then escorted the two men out of the house and ordered them off the property.

Although the individual defendants acknowledge that they did or may have entered both residences with their guns drawn, they adamantly deny pointing their guns at anyone, or sticking their guns in anyone's face, head, or back, during the course of either eviction. (D.I. 57 at A176, A224) According to defendant Heemer, deputy marshals are trained to have their guns drawn and pointed at the ground when going into a potentially dangerous situation, such as an eviction, especially where firearms may be present. (D.I. 57 at A196) Defendant Heemer also denies that drawers were opened, contending that the deputy marshals were looking only for people, not weapons, and that the search was restricted to those spaces where a person could hide. (D.I. 57 at A181-82) Finally, defendants contend that they were not assigned to perform an inventory of the Mellotts' personal belongings or to oversee the work of the moving company. (D.I. 57 at A227)

After the eviction, Bonnie Mellott contacted the U.S. Marshals Service and was given a phone number for the storage facility where the family's belongings had been taken. She states that although the official inventory matched what the Mellotts eventually retrieved from storage, she noticed numerous

items missing from the list. (D.I. 58 at A317-20) Plaintiffs claim that several items taken from the house were never returned, including legal papers and correspondence. They also allege that Bonnie Mellott's coin collection, a family heirloom worth over $150,000, disappeared from the house and was never returned. (D.I. 58 at A457) Bonnie Mellott testified that she wrote a letter to the moving company complaining about the missing items, but never received a response. (D.I. 58 at A320) She also stated that the storage facility has taken no action on her complaints. No complaint was ever filed with the U.S. Marshals Service. (D.I. 58 at A336)

III. DISCUSSION

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) provides that a party is entitled to a summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." A party seeking summary judgment always bears the initial responsibility of informing the Court of the basis for its motion, and identifying those portions of "the pleadings,

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8As defendants correctly point out, the Mellotts did not report this asset in the list of personal property accompanying their bankruptcy petition, despite a category on the form entitled "Books, pictures and other art objects; stamp, coin and other collections".

depositions, answers to interrogatories and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. Where, as here, the nonmoving party opposing summary judgment has the burden of proof at trial on the issue for which summary judgment is sought, he must then make a showing sufficient to establish the existence of an element essential to his case. If the nonmoving party fails to make sufficient showing on an essential element of his case with respect to which he has the burden of proof, the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Moreover, the mere existence of some evidence in support of the nonmoving party will not be sufficient to support a denial of a motion for summary judgment; there must be enough evidence to enable a jury to reasonably find for the nonmoving party on that issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

B. Quasi-Judicial Immunity

Plaintiff's present a challenge not only to the manner in which the eviction was carried out, but to the fact of the eviction itself. They assert that "no federal court had authority to evict or remove plaintiffs after November 7, 1992, the date...the Mellotts' farms and home were sold under a lift of stay of their bankruptcy." (D.I. 62 at 26) They also contend, throughout their pleadings, that the writ of assistance and the events leading up to it were designed to intimidate them and to further the alleged conspiracy to deprive them of their land. This aspect of plaintiffs' claims cannot stand

against the defendant deputy marshals.

Traditionally, public officials have enjoyed absolute immunity from civil damage claims in cases where they have simply carried out the facially valid orders of a court with proper jurisdiction. Mays v. Sudderth, 97 F.3d 107, 112 (5th Cir. 1996). This immunity derives from the absolute immunity of judges. Id. at 110-11; Pierson v. Ray, 386 U.S. 547, 553-54 (1967). As numerous courts have recognized, a rule immunizing the ministerial acts of public officials carrying out court orders is necessary to prevent the "obviously untenable" result of requiring those officials "to act as pseudo-appellate courts scrutinizing the orders of judges." Henry v. Farmer City State Bank, 808 F.2d 1228, 1239 (7th Cir. 1986); Patterson v. Von Riesen, 999 F.2d 1235, 1289 (8th Cir. 1993); Coverdell v. Dept. of Social and Health Services, 834 F.2d 758, 765 (9th Cir. 1987).

While courts have recognized exceptions, they are rare. For a court to remove the cloak of absolute immunity, the order which the defendants have executed must be "palpably illegal," Pacelli v. de Vito, 972 F.2d 871, 878 (7th Cir. 1992), or have been issued "in the clear absence of all jurisdiction." Mays v. Sudderth, 97 F.3d at 114; Turney v. O'Toole, 898 F.2d 1470, 1474 (10th Cir. 1990) (citing Stump v. Sparkman, 435 U.S. 349, 357 (1978). Such is not the case here. It is undisputed that the Mellotts voluntarily filed a petition for bankruptcy and that they stipulated to the sale of two parcels of land to satisfy part of their debt. (D.I. 57 at A5-37) The record is also clear that the Mellotts did not sell the parcels themselves, thus necessitating a public auction pursuant to

their agreement. After the land was sold, the Mellotts refused repeatedly to vacate the property. The writ of assistance issued by the bankruptcy court explicitly ordered the U.S. Marshal "to secure the real property described..., remove all persons from the premises, insure the peaceable removal of all personal property...and verify any inventory of personal property...." (D.I. 57 at A84) Nothing about this order on its face would indicate that it was in any way invalid. Because the defendant deputy marshals were performing a ministerial duty in carrying out an order that was not "palpably" unlawful, the court concludes that quasi-judicial immunity applies in this instance. Thus, the individual defendants may not be held liable for the fact of the eviction, but only for the manner in which it was carried out. Hazo v. Geltz, 537 F.2d 747 (3d Cir. 1976).

C. Conspiracy Claim

Plaintiffs contend that the individual defendants conspired with several non-party co-conspirators for the purpose of intimidating them and penalizing them for speaking out against those who wanted their land. In particular, plaintiffs claim involvement on the part of Gary Quill, Edward Heindel, Farm Credit of York, Farmers Home Administration, and the Federal Land Bank of Baltimore. (D.I. 13 at 3) Although the complaint does not list the bankruptcy judge who ordered the eviction as a co-conspirator, plaintiffs imply that the judge was motivated to "make an example" of them for filing frivolous lawsuits and voicing complaints about the repossession of their land. Their amended complaint states:

> The defendants conspired to use federal law and federal authority, unlawfully for unlawful purposes, to intentionally frighten the plaintiffs and to intimidate them, in order to stop plaintiffs(') efforts at litigation and to punish plaintiffs for suing certain defendants while also seeking to discourage plaintiffs() opposition to the federal government and to private persons and entitles who wanted plaintiff's land. The efforts of the Mellotts (and others like them) to save their farms and their homes was proving to be an irritant and an obstacle to government authority and to the goals of certain private persons and entities...so the defendants purposely planned the abuse of the Mellotts by, through and including the knowing misuse of federal law and authority to teach the plaintiffs a lesson and to provide an example to other would be objections.

(D.A. 13 at paragraph 82)

As discussed above, defendants are absolutely immune from damages stemming from the fact that the Mellotts were evicted from their farms. Plaintiffs can recover only for constitutional violations resulting from the manner in which the individual defendants executed the court's order. Plaintiffs have failed to put forth evidence that the manner in which the eviction was carried out was the product of a conspiracy. In their brief opposing defendants' motion for summary judgement, plaintiffs offered no response to defendants; argument that the record contains no support for plaintiffs' vague allegations of a conspiracy. Plaintiffs appear to base

their conspiracy claim entirely on a comment, allegedly uttered by defendant Heemer during the course of the eviction, to the effect that Edward Heindel could "do his own dirty work from now on". (D.I. 63 at B10) When asked during her deposition whether she had any other specific evidence of a conspiracy between defendants and the other alleged co-conspirators, Bonnie Mellott repled:

> I think the marshal defendants were in agreement with Farm Credit and F(m)HA. I think they meant to or delibertly planned to scare us to death, to put it bluntly. I think they wanted us to drop it. They thought they could come in the way they did and we would just drop everything, give up and run.

(D.I. 58 at A337-38) An extensive review of the materials submitted by the parties in connection with the pending motion yielded no further support for the existence of a conspiracy. The court concludes, therefore, that no reasonable fact finder could find the existence of a conspiracy based on the evidence that plaintiffs have put forth. Anderson v. Liberty Lobby Inc, 477 U.S. at 249. Defendant's motion for summary judgment as to Count V of the amended complaint will be granted.

D. First Amendment Claims

In their amended complaint, plaintiffs contend that the conduct of the individual defendants

> was meant to injure, frighten and intimidate the plaintiffs into dropping their opposition to the FmHA repossession program in order to further the repossession goals of (the alleged co-conspirators), and was also meant to

> punish plaintiffs, in the hope that they would spread the word to other farmers, because the defendants and aforementioned co-conspirators plaintiffs (and others like them) a nuisance, all of which was in violation of plaintiffs[']1st Amendment rights of free speech and association.

(D.I. 13 at paragraph 45) A plaintiff bears the burden of proving a defendant's unlawful intent when his or her claim alleges that certain acts were done to prevent or punish the exercise of constitutional rights. Mt. Healthy City Board of Educ. v. Doyle, 429 U.S. 274, 187 (1977); Edmundson v. Borough of Kennett Square, 4F.3d 186, 190(3d Cir 1993). Because plaintiffs have failed to establish a conspiracy, plaintiffs can prevail on their First Amendment claims only if they can establish that the individual defendants were aware of plaintiff's exercise of their rights of speech and association and were motivated by a desire to stop or punish this activity. Plaintiffs have not put forth any evidence to support such a conclusion.

In his deposition, Kirk Mellott was unable to identify any speech or association rights he thought had been interfered with or punished by defendants' actions. He stated that he was unaware of any "repossession program" of the FmHA, and could not describe any associational activity he had undertaken:

G. What associations of yours do you feel were being punished by defendants' conduct?

A. Just of being pushed around and having a gun pulled on you.

Q. What I'm asking specifically is the word association means associating with people or groups or something. Was there some

particular association that you had with other people that you felt the defendants were trying to stop?

A. It wouldn't be anything I had they was trying to stop.

(D.I. 58 at A 362) Similarly, plaintiff Wright stated during his deposition that he thought his own First Amendment rights had not, in fact, been violated. (D.I. 58 at A416) Plaintiff Hollinshead, when asked how defendants had violated her First Amendment right, replied:

They didn't want anybody there to express their feelings, they wanted them to shut up and do what they wanted them to do.

Q. You're referring to your freedom tc speak during the eviction?

A. Yes, freedom of press.

(D.I. 58 at A442) She admitted, however, that none of the defendants had tried to prevent her from writing or airing her story, and that she in fact did air her story. (D.I. 58 at A445) Her only complaints appeared to be the deputy marshals' refusal to answer her questions during the eviction and their insistence that she remain quiet during the approximately 45 minutes it took defendants to sweep and secure the house. (D.I. 58 at A446) These complaints do not rise to the level of constitutional violations.

The only specific, protected activity that the Mellotts claim to have engaged in is the filing of lawsuits against their creditors and other individuals. Yet, when specifically asked whether the deputy marshals were aware of these suits, Bonnie Mellott replied that they probably were not. Jackie Wright expressed a similar opinion during his deposition. (D.I. 58 at A334-35, A415)

Plaintiffs have failed to put forth evidence that defendants were aware of any First Amendment protected activities engaged in by plaintiffs. There being no genuine dispute of material facts, the court concludes that defendants are entitled to judgment as matter of law on plaintiffs' First Amendment claims.

E. Fourth Amendment Claims

To establish a Fourth Amendment claim where, as here, the defendant deputy marshals have acted pursuant to a valid court order, plaintiff must establish that defendants used excessive force in carrying out the eviction order. Graham v. Connor, 490 U.S. 386, 394-95 (1989). In determining whether a use of force violates the Fourth Amendment, one must inquire whether the use of force was objectively reasonable in light of the facts and circumstances existing at the time of the action. Id. at 396. The analysis balances the nature of the intrusion against the governmental interests at stake. Id. The Supreme Court has set forth three factors for the court to consider: 1.) The severity of the crime at issue; 2.) whether the suspect is an immediate threat to officers or others; and 3.) whether the suspect is actively resisting arrest or fleeing. If. The reasonableness inquiry is objective but should give appropriate weight to the circumstances of the law enforcement action, which are often "tense, uncertain, and rapidly evolving." Id. at 397.

1. Allegations Against Defendants Heemer and Seich

Plaintiffs contend that defendant Heemer utilized excessive force by pointing his gun at Bonnie Mellott and shoving her into a chair

twice; by telling the Mellotts that they would be shot if they returned to the farms; by holding Jackie Wright at gunpoint and using him as a human shield; and by throwing Kirk Mellott into a wall, frisking him, and holding a gun on him. Defendant Seich, plaintiffs contend, used an unreasonable amount of force in chambering a round in his shotgun, pointing it directly at Wilkie Mellott's chest, and threatening to shoot if he did not sit still.

While "not every push or shove" constitutes excessive force, whatever force is used must be objectively reasonable in light of the circumstances. Graham v. O'Connor, 490 U.S. at 396. In Baker v. Monroe Township, 50 F.3d 1186, 1193 (3d Cir. 1995), the Third Circuit confronted a case where police had detained several individuals who were walking toward a house that officers were raiding for drugs. The plaintiffs, family members of the resident of the house, were held at gunpoint, handcuffed, and detained for approximately twenty five minutes. Addressing the plaintiffs' Fourth Amendment claims, the court ruled that

> the use of guns and handcuffs must be justified by the circumstances... Moreover, we must look at the intrusiveness of all aspects of the incident in the aggregate. In this case, adding up the use of guns and handcuffs and, indeed, the length of the detention, shows a very substantial invasion of the [plaintiffs'] personal security.

Id. at 1194. Whether the actions of the defendant Heemer and Seich violated the Fourth Amendment depends on the resolution of facts in dispute. Heemer and Seich deny pointing their weapons directly at any of the

plaintiffs, and Heemer claims that he never shoved Bonnie Mellott or threatened to shoot plaintiffs. While plaintiffs do not challenge defendants' assertion that their supervisor warned them of potential violence, defendants themselves acknowledge that pointing their weapons at plaintiffs would have been improper and against policy. Because there are material facts in dispute, summary judgement is not appropriate on the Fourth Amendment claims against defendants Heemer and Seich.

A more serious issue exists with respect to plaintiff Hollinshead's accusations against defendant Hardy. In the complaint, plaintiffs identified defendant Hardy as the deputy marshal who put a gun to the back of plaintiff Hollinshead's head and ordered her to get off the telephone. (D.I. 13 at paragraph 61-64) At her deposition on September 19, 1996, however, Hollinshead stated that she thought defendant Regan, rather than Hardy, had been the one to point his gun at her. (D.I. 58 at A421) On February 10, 1997, plaintiffs filed a response to defendants' requests for admission in which they again asserted that Hardy, not Regan, had pointed the gun:

> Plaintiff Michelle Hollinshead has positively identified the defendant Hardy as the person who put a gun to the back of her head as set forth in the complaint and amended complaint. By the way of further response, defendant Heemer, by way of answering interrogatories addressed to him by the plaintiffs, identified defendant Hardy as the person who carried the type of firearm used on the plaintiff Michelle Hollinshead on January 21, 1993.

(D.I. 58 at A500) Defendants contend that

because Hollinshead has not consistently identified defendant Hardys the person who held her at gunpoint, her claims against him should be dismissed. The court disagrees. In her deposition, defendant Heemer conceded that putting a gun to the head of an unarmed person would have been "absolutely" inappropriate. (D.I. 57 at A212)) Based on the record thus far, a jury could reasonably conclude that such behavior occurred and that it constituted excessive force under the Fourth Amendment. As to the identification issue, the question of whether Hollinshead can properly and accurately identify the person who held a gun to her head is properly left to a jury. According to defendants Regan and Hardy, they were both present in the kitchen while Hollinshead was on the telephone. Defendants are free to impeach Hollinshead's credibility with her deposition testimony; the inconsistencies among the complaint, the deposition, and the response to the request for admissions do not, however justify granting summary judgement in either defendant's favor.

F. Fifth Amendment Claims

The Due Process Clause of the Fifth Amendment protects against deprivation of "life, liberty, or property, without due process of law." The purpose of such language is "to prevent government 'from abusing [its] power,, or employing it as an instrument of oppression.''' DeShaney v. Winnebago Cty. Dept of Social Services, 489 U.S. 189, 196 (1989).

Plaintiffs allege that defendants' actions during the eviction process violated their substantive due process rights under the Fifth Amendment. In construing this claim, it is important to note the Supreme Court's

repeated admonitions against interpreting substantive due process rights over broadly. Fagan c. City of Vinewood, 22 F.3d 1296, 1306 n. 6 (3d Cir. 1994) (citing Collins v. City of Harker Heights, 503 U.S. 115 (1992); Albright v. Oliver, 510 U.S. 266 (1994). The court must guard against attempts to raise ordinary tort claims to the level of constitutional violations. Colins v. City of Harker Heights, 503 U.S. at 128; Fagan v. City of Vinewood, 22 F2d at 1305; Boveri v. Town of Saugus, 113 F.3d 4, 6 (1st cir. 1997). To establish a substantive due process claim against government employees, plaintiffs must produce evidence that defendant's actions were arbritary or shocking to the conscience. Collins v. City of Harker Heights, 503 U.S. at 128; Black v. Stephene, 662 F.2d 181, 183 (3d Cir 1981). To meet this standard, plaintiffs must "do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power. That is, the plaintiff must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking." Uhlrig v. Harder, 64 F.3d 567 (10th Cir 1995), cert denied, 116 S.Ct. 924 (1996).

In Black v. Stephens, the Third Circuit addressed a somewhat similar situation to that alleged by plaintiffs at bar. Int hat case, a police officer who was not in uniform, was driving an unmarked car, and did not identify himself stopped a vehicle at an intersection. He screamed that the driver was "a rotten driver," and pointed a gun at the driver's head. The court upheld the jury's verdict for the plaintiffs, finding that "[f)or an unidentified officer to brandish his revolver

eighteen inches from [the driver's] head with [passenger] in the direct line of fire and then threaten to shoot, it conduct that shocks the conscience." Id. at 189.

As defendants point out, the facts in the present case differ in several respects from those in Black. In the present case, the Mellotts had notice that they would be evicted and had taken steps to prepare, such as packing their belongings and calling their friend to help them move. Although Bonnie and Wilkie Mellott and Jackie Wright said that they did not recall seeking any insignia identifying windbreakers the deputy marshals claim to have worn. Moreover, defendants arrived with two state troopers, both of whom were in uniform and drove to the house in a marked patrol car. Plaintiffs had at least some indication that the men at the Mellotts' door were law enforcement agents. This case also differs from Black in that, while plaintiffs claim to have done nothing to provoke defendants while they were in the

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9It is clear whether the state troopers accompanied the two deputy marshals and Jackie Wright to Kirk Mellott's house.

10To the extent that plaintiffs base their Fifth Amendment claim on their allegation that their belongings disappeared or were damaged in the move, the court finds that such a claim does not rise to the level of a constitutional violation. Rather, is sounds in tort. Plaintiff's tort claims against the United States will be addressed in the following section of this memorandum opinion.

house, there is undisputed evidence that the deputy marshals had been warned by their supervisor of potential violence on the part of the Mellotts.

The question of whether conduct is "truly conscience shocking" is one for the jury. Given the factual disputes as to the events of January 21, 1993, the court cannot grant defendants summary judgement on plaintiffs' substantive due process claim.

The Third Circuit has also recognized a special area of Fifth Amendment liability under the so-called "state-created danger" theory. According to this theory, a government employee may be held responsible for a substantive due process violation where:

> 1) the harm ultimately caused was forseable and fairly direct; 2) the [government] actor acted in willful disregard for the safety of the plaintiff; 3) there existed some relationship between the state and the plaintiff; 4) the state actors used their authority to create an opportunity for the third party's crime to occur.

Kneipp v. Tedder, 95 F.3d 1199, 1208 (3d Cir 1996) (citing Mark v. Borough of Hatboro, 51 F.3d 1137, 1152 (3d Cir), cert denied, 116 S.Ct. 165 (1995). The only plaintiff whose Fifth Amendment claim may be analyzed under this standard is Jackie Wright. If, as plaintiffs have alleged, defendant Heemer used Wright as a "human shield" in confronting a potentially dangerous Kirk Mellott, there was at least a forcesable potential for serious harm. Placing Wright in such a situation at gunpoint, as he alleged, amounts to a willful disregard for his safety. Although Wright was

not under arrest, and although he volunteered to accompany the deputy marshals to Kirk Mellott's house, a special relationship at least arguably existed, especially it he was walked up to the house at gunpoint. Finally, defendant Heemer's alleged use of his authority and his weapon to place Wright in a hazardous situation appears to satisfy the fourth element of the test. Unfortunately, little guidance is available to the court in determining whether a plaintiff can establish due process violation under the state-created danger theory where, as here, the danger form the third party never materialized. The analysis is further complicated by Wright's statements that he did not feel at risk of violence from Kirk Mellott. He testified at his deposition that "I knew there was no reason for me to be worried with Kirk. Kirk, he's not going to hurry anybody, but they go barging in there, like I said, down at Bonnie and Wilkie's and they could have scared him." (D.I. 58 at A412) He does claim, however, that defendant Heemer placed him in a dangerous situation and that he was harmed by the exposure to that risk. Because of the heavily disputed factual aspects of plaintiff Wright's claim, the court concludes that the issue of whether defendants violated Wright's substantive due process rights by placing him in a "state-created danger" must be left to a jury.

G. Qualified Immunity

Defendants are entitled to qualified immunity if a reasonable official in their position at the relevant time, with the information then available to them, could have believed that their actions or omissions did not violate clearly established law. In re

City of Philadelphia Litigation, 49 F.3d 945, 961 n. 14 (3d Cir), cert denied, Africa v. Philadelphia, 116 S.Ct. 176 (1995). The burden of establishing entitlement to qualified immunity rests wit the defendant officials. Ryan v. Burlington County, 860 F.2d 1199, 1204 n. 9 (3d Cir 1988). Government officials performing discretionary functions are immune from liability for civil damages, provided that their conduct doe snot violate "clearly established statutory or constitutional right of which a reasonable person would have known." Harlow v. fitzgerald, 457 U.S. 800, 818 (1992), A right is "clearly established" when "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). Thus, the qualified immunity defense rests upon the objective reasonableness of the official's actions in light of clearly established law and the information possessed by the defendants at the time of the alleged violation. Id. at 641.

The Third Circuit has "adopted a broad view of what constitutes an established right of which a reasonable person would have known," Stoneking v. Bradford Area Sch. Dist, 882 F.2d 720, 726 (3d Cir 1989) (quoting Sourbeer v. Robinson, 791 F.2d 1094, 1103 (3d Cir. 1986), holding that there does not have to be "precise factual correspondence" between the instant case and a previous case in order for the right to be clearly established. People of Three Mile Island v. Nuclear Regulatory Comm'rs, 747 F.2d 139, 144-45 (3d Cir 1984). The rights to protection from arbritary use of government power, and to be free from unreasonable searches and seizures

are well established. Because there are factual disputes as to defendant's conduct and defendants concede that their conduct, as described by plaintiffs, would be inappropriate, the court declines to find that defendants are entitled to qualified immunity.

H. Pendant State Law Claims

By order of this court on September 25, 1996, the United States was substituted for th individual defendants in plaintiffs' pendant state law claims of assault, civil conspiracy, and intentional infliction of emotional distress. (D.I. 49) claims against the United States sounding in tort are subject to the provisions of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §2671 et seq. Under the FTCA, a claimant seeking money damages against the United States must "present[ ]his claim to the appropriate Federal agency" before bringing an action in court. 28 U.S.C. §2675(a). The requirement that a plaintiff present his claim to the appropriate agency, in wiring within two years of the claim's accrual is "a jurisdictional prerequisite to suit, imposed by Congress, which the courts have no power to waive." Nero v. Cherokee Nation, 892 F.2d 157, 1463 (10th Cir 1989). The requirement must be constructed strictly. Deutsch v. United States, 67 F.3d 1080, 1091 (3d Cir 1995); Le Grand v. Lincoln, 818 F.Supp. 112, 116 (E.D. Pa. 1993), and plaintiffs bear the burden of establishing that they have complied with the administrative prerequisite. Livera v.First Nat'l State Bank, 879 F.2d 1186, 1195 (3d cir. 1989).

Plaintiffs at bar not claim to have brought an administrative complaint to the U.s. Marshals Service, nor do they dispute the

contention of defendant the United States that they were required to do so. Rather, they contend that the actions of Assistant United States Attorney Robert DeSousa, in failing to identify the deputy marshals responsible, prevented them from bringing an administrative complaint within the statute of limitations. (D.I. 62 at 2) The court is not convinced that plaintiffs were precluded from filing an administrative complaint. Plaintiffs obtained the names of all four individual defendants no later than January 10,1995. (D.I. 62 at 4) It is true that the names of the John Doe defendants were disclosed only after suit was filed, pursuant to a court order to compel discovery. However, the disclosure took place within the two year time limit for filing an administrative action with the U.S. Marshals Service. Even if defendants' counsel had somehow prevented plaintiffs from obtaining the names of the deputy marshals involved until after the expiration of the limitations period, plaintiffs offer no reason why they could not have filed a John Doe administrative complaint, as they did with their initial complaint in the instant suit. Moreover, a plaintiff's claim that pursuing administrative remedies would be futile cannot excuse the jurisdictional requirement. Nero v. Cherokee Nation, 892 F 2d at 1463. Because plaintiffs have failed to comply with the jurisdictional requirements of the FTCA, their pendant state law claims against the United States will de dismissed.

IV CONCLUSION

For the reasons above, the court will grant summary judgment in favor of defendants on plaintiffs' First Amendment and conspiracy claims. Count VI through XI of the amended

complaint, which articulate state law tort claims against the United States, will be dismissed for failure to exhaust administrative remedies. Defendants' motion for summary judgement on the Fourth and fifth Amendment claims will be denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILKIE MELLOTT, BONNIE MELLOTT, KIRK MELLOTT, MICHELLE HOLLINSHEAD, and JACKIE WRIGHT,	)	CIVIL ACTION NO 1:CV-94-2071
Plaintiffs	)	
v.	)	
DON HEEMER, DAVID SEICH, PAUL HARDY, AND MICHAEL REGAN, individually and the UNITED STATES OF AMERICA,	)	
Defendants	)	

ORDER

At Wilmington this 23 day of July, 1997, consistent with the memorandum opinion issued this same date;

IT IS ORDERED that:

1. Defendants' motion for summary judgment (D.I. 55) is granted with respect to Count V of the amended complaint and plaintiffs' First Amendment claims.

2. Defendants' motion for summary judgment is denied with respect to plaintiffs' Fourth and Fifth Amendment claims.

3. All claims against defendant The United States (Counts VI through XI of the amended complaint) are dismissed for failure to exhaust administrative remedies.

_____
United States District Judge

APPENDIX A - MEMORANDUM OPINION OF THE COURT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-7437

WILKIE MELLOTT; BONNIE L. MELLOTT; KIRK MELLOTT; MICHELLE HOLLINSHEAD; JACKIE WRIGHT

V.

DON HEEMER; DAVID SEICH; PAUL HARDY; MICHAEL REGAN; UNITED STATES OF AMERICA,

Appellants

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 94-02071)

Argued: April 27, 1998

Before ALITO, RENDELL, and GARTH,
Circuit Judges

(Opinion Filed: November 5, 1998)

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OPINION OF THE COURT

ALITO, Circuit Judge:

This case involves allegations that several Deputy United States Marshals used excessive force during a court ordered eviction, On appeal, the marshals contend that the district court erred by refusing to grant summary judgement in their favor on grounds of qualified immunity. Because we conclude that the marshals are entitled to summary judgement on all the plaintiffs' claims, we reverse.

I

Bonnie and Wilkie Mellott ("The Mellotts") are former owners of land in Pennsylvania on which they resided and operated a dairy farm. The Mellotts son Kirk, also resided on the property in a separate house located about a mile away from his parents' home. In the early 1980's, the Mellotts borrowed money to purchase additional land and to make improvements on their farm. After falling far behind in their debt payments, the Mellotts filed a voluntary petition for bankruptcy in 1989. The Mellotts' property was sold at a public auction in November 1992, and the bankruptcy court issues an order directing the Mellotts to vacate the premises by December 10, 1992.

The Mellotts failed to leave their former property by that date, and the bankruptcy court issued an order of contempt on December 21, 1992. The court directed the Mellotts, under penalty of incarceration and/or fine, to vacate the premises by December 28, 1992. The Mellotts still refused to leave and instead responded by filing a motion to vacate the judgement, a notice of appeal, a motion to disqualify the bankruptcy judge, and a notice of motion to stay. On December 31, 1992, the bankruptcy court denied the Mellott's motions and signed a writ of assistance directing the United States Marshal Service to serve the Mellotts with a notice stating that all persons and personal property had to be removed from the premises by January 5, 1993. The deputy marshals testified that they posted the notices at the Mellotts' residence on December 31, 1992, and Kirk Mellott testified that he found a notice on his door that same

day. Kirk further testified that he discussed the notice with is parents and understood that the notice ordered him to vacate the premises.

After the Mellotts again failed to leave by the ordered date, the bankruptcy court issued a writ of assistance, dated January 11, 1993, directing the United States Marshal Service to secure the auctioned land and remove all persons from the premisses. Upon receipt of the writ, Supervisory Deputy United States Marshal Robert Byerts assigned Deputy Marshal Don Heemer to head a team of five deputy marshals ("the Marshals") that would remove the Mellotts from the property. Byerts testified that he provided the marshals with the following information prior to the eviction:

a.) The Bankruptcy Court had requested additional security for hearings at which the Mellotts were expected to appear:
b.) A Farmers Home Administration (FHA) County Supervisor had reported that Wilkie Mellott had chased him off the Mellott property at the front of a pick-up truck; that Wilkie Mellott had displayed a handgun after chasing the county Supervisor off the property in a pick-up truck; that Wilkie Mellott had threatened to shoot any federal agent that came on his property; and that the County Supervisor had felt his life had been threatened by Wilkie Mellott.
c.) The Mellotts were reported to own numerous firearms.
d.) Kirk Mellott had recently sustained a serious head injury and was considered unstable.

e.) Kirk Mellott had informed Deputy Marshals Regan and Knicely that the Mellotts were not going to leave the farms.

App. 59-60. See also App. 100-110-114, 117, 162-63 (deposition of Donald Heemer); App 182-85 (deposition of David Seich) Byerts further testified that the marshals wore bullet proof vests and were authorized to use a short shotgun and an AR-15 semi-automatic rifle in the removal operation because of concerns that they might meet armed resistance at the Mellott residence." App. 59.

On the morning of January 21, 1993, the marshals met with at least two informed state troopers and drove to the Mellotts' residence. Viewing the evidence in the light most favorable to the plaintiffs, the eviction proceeded as follows.

When the officers arrived at the Mellotts' residence, they approached the house, and Deputy Marshal Heemer knocked on the front door. After Bonnie Mellott answered the door, Heemer entered the house, pointed a gun "right in her face," pushed her into a chair, and kept his gun aimed at her for the remainder of the eviction. App 264-65, 424, 441. Deputy Marshal David Seich entered the house next, "pumped a round into the barrel" of his sawed-off shotgun, pointed it at Wilkie Mellott, and told him "to sit still, not move and to keep his mouth shut". App. at 265 See also App. at 440-41.With respect to this encounter, there is evidence that the marshals

1.) Like the district court, we consider the existence of the Byert's briefing to be undisputed. See Dist. Ct.Op at 8.Although the plaintiffs disagree, see Appellees' Br. at 25-29, they have presented no evidence to contradict the marshals' testimony that the briefing took place. Rather, the plaintiffs have merely demonstrated that there is a dispute as to whether all of the information Byerts provided to the marshals was accurate. For example, the Mellotts presented evidence that contradicted the FHA agent's account of his confrontation with Wilkie Mellott. It is not relevant, however, that the Mellotts have disputed the agent's version of events. Rather, the critical question is whether the agent's account was provided to the marshals by their supervisor. The marshals testified that it was, and the plaintiffs point to no evidence indicating otherwise.

2.) We note that the marshals dispute nearly every material factual allegation made by plaintiffs, including the most serious claims that the deputy marshals pointed loaded guns at various individuals during the eviction. For purposes of summary judgement, however, we must view the evidence in the light most favorable to the non-moving party. See Peters v. Delaware River Port Authority, 16 F.3d 1346, 1349 (3d Cir. 1994).

were aware before the eviction that Wilkie Mellott was recovering from heart surgery. Supp. App. at 9 n. 3 & 42. Behind Seich, two more marshals entered the house along with a state trooper who identified himself and said

that he "was there for everybody's protection." App. at 266.

Also present in the Mellotts' home at the time of the eviction were Michelle Hollinshead, a radio reporter, and Jackie Wright, a friend of the Mellotts. When the marshals entered the residence. Wright was in the front room with the Mellotts, and Hollinshead was in the kitchen on the telephone with the local sheriff. Hollinshead testified that one of the marshals ran into the kitchen, "pumped" his semi-automatic gun, "stuck it right in (her) face and... said: "Who are you talking to , hang up the phone", App. at 454-55. See also App. at 461-63. After Hollinshead continued talking, the marshal put his gun "to the back of her head", and told her to "(s)hut the hell up and hang up the phone, and the marshal put his gun into her back and shoved her down a hallway towards the front room.

In the meantime, while two marshals were conducting a sweep of the residence, Wilkie Mellott said he felt ill and requested his medication. When Bonnie Mellott rose to get the medication, Deputy Heemer pushed her back into er chair and asked her where the medication was located. After receiving this information, Heemer retrieved Wilkie Mellott's medication and handed it to him.

At some point during the eviction, Bonnie Mellott overheard the marshals discussing their plans to remove Kirk Mellott from his residence, and she offered to accompany them to Kirk's house. The marshals rejected this offer but agreed to allow Jackie Wright to

come with them. In their depositions, both Wright and Bonnie Mellott explained that they

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3.) Our account of the facts does not include the plaintiffs' allegations that the marshals violated the Constitution by "ransacking" the Mellotts, former residences. See Appellees' Br. at 32-34. The district court found that the plaintiffs' "ransacking" claim did "not rise to the level of a constitutional violation," Dist.Ct. Op. at 27 n.10; id. at 24, and the plaintiffs have not appealed this holding.

were concerned about how Kirk might react to the marshals, see App. at 272 & 426, and Bonnie testified that she believed it would be helpful if Kirk saw a "familiar face," App at 310. Before proceeding to Kirk's house, the Deputy marshals directed Bonnie and Wilkie Mellott to leave the property, and Deputy Heemer allegedly told them to start driving and not to look back or they would be shot. Bonnie Mellott also testified that Heemer said they would be shot as trespassers if they went to Kirk's house.

After the Mellotts departed, Jackie Wright drove to Kirk's residence in his own vehicle, followed by the marshals and the state troopers. Wright testified that, once at the house, the marshals told him that he "was going to go through the door first ahead of them," App. at 429. One marshal advised Wright "that if anything goes wrong...you're going to be the first one to go down," and as they were "heading into the house," Wright felt a "gun

in (his) back," Id. See also App. at 379. Wright entered the house without knocking and found Kirk Mellott sitting in his living room with a bag full of his belongings. Defendant Heemer then approached Kirk, "aimed his gun at (his) chest, physically tool (him) by the arm, spun him around and pushed him up against the wall." App. at 386-87. After searching Kirk's bag and conducting a sweep of the residence, the marshals escorted the two men out of the house and ordered them off the property.

The plaintiffs filed an amended complaint in January 1995, alleging, inter alia, that the individual defendants violated their Fourth Amendment right to be free from unreasonable seizures and their Fifth Amendment right to substantive due process. The defendants moved for summary judgement on the ground that they were entitled to qualified immunity, and the district court denied their motion, finding that there were material issues of fact as to (1) whether the defendants violated the plaintiffs' Fourth and Fifth Amendment rights by using excessive force during the eviction and (2) whether the defendants reasonably could have believed that their conduct did not violate clearly established law. We have jurisdiction over the defendants' appeal under the collateral doctrine. See Acierno v. Cloutier, 40 F.3d 597, 605 (3dCir. 1994) (in banc).

II

A. The marshals are entitled to qualified immunity if, at the time they acted, they reasonably could have believed that their conduct did not violate the plaintiffs' clearly established constitutional rights. See

Sharrar v. Felsing, 128 F.3d 810, 826 (3d Cir. 1997). In addressing the qualified immunity question, we first ask whether the plaintiffs have "asserted a violation of a constitutional right at all." Siegert v. Gilley, 500 U.S. 226, 232 (1991). Because we conclude that they have not, we must reverse the district court's denial of summary judgement.

The Supreme Court has instructed that "all claims that law enforcement officers have used excessive force... in the course of a[]... 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a substantive due process' approach. "Graham v. Connor, 490 U.S. 386, 395 (1989). Since all of the plaintiffs' excessive force claims in the instant case involve allegations that the marshals restrained the plaintiffs' liberty through physical force and the pointing of guns, we must analyze the plaintiffs' claims under the Fourth Amendment. See id. at 395 n.10.

In order to prevail on a Fourth Amendment excessive force claim, a plaintiff must demonstrate that the defendant's use of force was not "objectively reasonable." Graham v. Connor, 490 U.S. 386, 397 (1989). Proper application of this standard "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Id. at 396. In addition, we have noted that it is important to consider how

many individuals the officers confronted and whether "the physical force applied was of such an extent as to lead to injury." Sharrar v. Felsing, 128 F.3d 810, 882 (3d Cir. 1997). When balancing these factors, we must remember that "(t)he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather then with the 20/20 vision of hindsight." Graham, 490 U.S. at 396. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make spilt-second judgements - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation." Id. at 396-97. We must also keep in mind that a threat that may seem insignificant to us in the security of our chambers may appear more substantial to a reasonable officer whose own life or safety is at stake.

B. Turning to the case before us, the plaintiffs' claims all center on allegations that the deputy marshals pointed loaded guns at their heads, chests, and backs. In addition, Bonnie Mellott claims that she was pushed into a chair on two occasions, and Jackie Wright claims that he was led at gunpoint into a potentially dangerous situation.

We have recently considered allegations of excessive force similar to those made here. In Sharrar, more than 20 law enforcement officers surrounded a house containing four suspects wanted in connection with a particularly violent domestic assault. 128

F.3d at 814-816. After the suspects complied with the officers' instruction to exit the house backwards, they were ordered to lie face-down in the dirt. Id. at 816. The plaintiffs claimed that, at this point, the officers held guns to their heads, yelled obscenities, and threatened to "blow (their) brains out" if they moved. Id. at 816 & 821. While we acknowledged that the officers' alleged conduct "appear(ed) extreme," id. at 821, we concluded that it did not violate the Fourth Amendment, Id. at 822.

The marshals contend that their actions cannot be found unlawful since the Mellotts' allegations of force...are minimal compared to the allegations of force found to be constitutionally permissible in Sharrar." Appellants' Br. at 23. While we do not necessarily agree that the allegations in this case are "minimal" compared to those in Sharrar, we do believe that the explicit threats alleged in Sharrar were at least as forceful as the implicit threats alleged here. However, contrary to the marshals' suggestion, it is not enough simply to compare the force used in this case with the force employed by the officers in Sharrar. Several of the "reasonableness" factors discussed in Graham and Sharrar weigh differently here than they did in Sharrar, with some favoring the Mellotts and others favoring the deputy marshals. Therefore, while comparison to Sharrar can be instructive, our reasonableness determination must ultimately turn on the unique facts and circumstances confronting the marshals in this case.

Looking first to the severity of the crime factor from Graham, we note that the marshals were not arresting the Mellotts for a violent crime, but rather were removing them from their former property after they repeatedly failed to obey a court order. We also note, however, that an eviction from a cherished family residence can be an emotionally charged event. Turning to the "active resistance: factor discussed in Graham, we conclude that this factor does not weigh in favor of the deputy marshals since there is virtually no evidence of resistance during the eviction itself. However, the final Graham factor - "threat to the safety of officers or others" - weighs heavily in the marshals' favor and leads us to conclude that their alleged conduct during the eviction was objectively reasonable at the time.

Prior to the eviction, Supervisor Byerts informed the deputy marshals that Wilkie Mellott had threatened to shoot any federal agent who came on his property, was reported to own numerous firearms, and had chased an FHA agent off his property with a pick-up truck. Moreover, Byerts told the marshals that Kirk Mellott was considered unstable and had stated that the Mellotts would not leave the property. In light of these warnings, the marshals had significant reason to fear armed confrontation. Under these circumstances, it was objectively reasonable for he marshals to load and point their weapons in an effort to discourage resistance and ensure their own safety.

While the luxury of hindsight might enable us to think of alternatives to the

marshals' actions, we must heed the

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4 Because Michelle Hollinshead's testimony indicates that she did not hang up the phone immediately after being told to do so by one of the marshals, this factor does weigh in favor of the defendants with respect to actions taken after Hollinshead disobeyed the marshal's instruction.

Supreme Court's admonition to account for the "tense, uncertain, and rapidly evolving" circumstances facing officers at the time of their action. Here, when the deputy marshals entered the front room of the Mellotts' house, they discovered not only Bonnie and Wilkie Mellott, but a third unidentified individual, Jackie Wright, and they hears a fourth unidentified individual, Michelle Hollinshead, talking in another room. At the time, the marshals had no way of knowing to whom Hollinshead was speaking on the phone, and the marshals reasonably could have feared that she was calling a confederate of the Mellotts. In this respect, it is noteworthy that Kirk Mellott, whom the deputy marshals believed to be unstable, had not yet been found. On a related note, we find that one of the additional reasonableness factors discussed in Sharrar - "the number of persons with whom the police officers must contend at one time," 128 F.3d at 822 - weighs significantly in the marshals favor. Unlike in Sharrar, where there were over peaceably surrendered en masse, here there were fewer than 10 officers present to contend with five individuals who were not all found in the same place at the same time.

Our conclusion that the marshals acted reasonably is further bolstered by another factor discussed in Sharrar: whether the force applied by the officers led to physical injury. Although Wilkie Mellott did experience chest pains during the eviction, the marshals promptly retrieved his medicine, and there is no allegation that Wilkie Mellott suffered any further complications. In addition, while the plaintiffs claim that Bonnie Mellott was pushed into a chair on two occasions, they present no evidence of resulting physical injury. In this respect, we must be mindful of the physical injury. In this respect we must be mindful of the Supreme Court's instruction that "[n]ot every push or shove ...violated the Fourth Amendment." Graham, 490 U.S. at 396.

In sum, in light of the reports of the Mellotts' threatening behavior, the uncertainly of the situation confronting the marshals during the eviction, and the lack of any physical injury to the plaintiffs, we find that the force used by the marshals in confronting Bonnie and Wilkie Mellott, Michelle Hollinshead, and Kirk Mellott was objectively reasonable at the time.

C. Several arguments made by dissent require a brief response. First, contrary to the dissent's argument, this case is easily distinguishable from Baker v. Monroe Township, 50 F.3d 1186 (3d Cir 1995). In Baker, the court held, among other things, that the facts could support a finding that certain law enforcement officers violated the Fourth Amendment when they pointed firearms at and handcuffed Inez baker, two of her children,

and a foster daughter. These individuals had been invited to Sunday dinner at the apartment of Inez Baker's son, but they had the misfortune to arrive just as the officers were conducting a drug raid on the apartment. Viewing the facts in the light most favorable to the plaintiffs, the court conducted that the appearances were those of a family paying a social visit" and that there was "simply no evidence of anything that should have caused the officers to use the kind of force they are alleged to have used." Id at 1193. Here, for the reasons already discussed, the marshals had reason to fear for their safety when they entered the Mellott residence.

The dissent points out that "defendants Heemer himself testified in his deposition that pointing a gun at an unarmed person was "absolutely inappropriate" conduct." Dissent at 15, lines 39-40 to 16, line 1. But our task here is to apply constitutional standards,not standards of "appropriateness," Elder v. Holloway, 510 U.S. 510, 515 (1995); Davis v. Scherer, 468 U.S. 183, 193-96 & n. 14 (1984).

The dissent observes that "whatever fear the marshals had to cause them to descend on the Mellott farm with guns blazing was immediately dissipated when they encountered a pastoral scene of several people sitting peaceably in a parlor. Dissent at 16, lines 24-27. Putting aside (a) the fact that the marshals' guns were never fired and thus were not "blazing" in the usual sense of that term and (b) the fact that violence can erupt in a "pastoral" (i.e., country) setting, a reasonable officer was not, in our view, required to banish all fear upon seeing that

Bonnie and Wilkie Mellott and Jackie Wright were sitting in the parlor with no firearms in view. A reasonable officer could have feared that firearms might be hidden and that the individuals in the parlor might have tried to obtain access to them. A reasonable officer also could have feared that other persons might be in to her rooms in the house. As we noted, the officers encountered one unidentified person, Jackie Wright, in the parlor, heard another, Michelle Hollinshead, talking in another room, and had no knowledge of the whereabouts of Kirk Mellott.

The dissent states that "(w)hile it might have been reasonable for the marshals to approach and enter the home in an aggressive made," the officers should have "adjust(ed) their response" when "Wilkie Mellott assured (them) that no one else was in the house and since they knew the marshals were coming, he had removed the guns". Dissent at 16, lines 27-34. However, a law enforcement officer with his or her own safety at stake could have reasonably proceeded with greater skepticism.

D. Jackie Wright's claim, while also subject to the considerations discussed above, is somewhat unique and requires additional analysis. The relevant facts, as stated by Wright in his depositions, are as follows:

I pulled in front of (Kirk Mellott's) house and... walked back towards the marshals' car. (One of the marshals) told me I was going to go through the there. And he told me I was going to go through the door first ahead of them. And he said, I want to advise you that if anything goes wrong in here you're going to

be the first one to go down[,] and as we were heading into the house. I felt a gun in my back.

App. at 429. Based on this account, the plaintiffs contend that the marshals violated the Constitution by using Wright as an unwilling "human shield" in a potentially dangerous situation.

We hold that the defendants are entitled to summary judgement on this claim because the evidence int he summary judgement record cannot support a finding that Jackie Wright was seized or that a reasonable officer could not have believed that Wright was not seized. "[A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." California v. Hodari D. 499 U.S. 621, 627-28 (1991), quoting United States v. Mendenhall, 446 U.S. 544 (1986) (opinion of Stewart, J.). INS v. Delgado, 466 U.S. 210, 215 (1984). Here, it is undisputed that the marshals did not restrain Wright's liberty when he accompanied them to Kirk Mellott's residence. The marshals did not compel Wright to go with them, on the contrary, they originally refused when Bonnie Mellott asked to accompany them but eventually acceded to Wright's request. Thus, in order to survive summary judgement on his Fourth Amendment claim, Wright would have to point after he arrived at Kirk's house, he changed his mind and decided that he did not want to enter the house with the marshals but that the marshals forced him to do so. No such evidence, however that the marshals told

Wright did not state during his deposition that he ever told the marshals that he wished to leave or to remain outside Kirk's house. Nor did he testify that the marshals ever told him that he was not free to leave or to stay outside the house.

In light of this background, the summary judgement record is insufficient to convince a reasonable fact finder that a reasonable person in Wright's position would have felt that he was not free to leave the scene or to stay outside the house. Wright points to his deposition testimony that one of them marshals told him that he was "going to go through the door ahead of them" and that if anything went wrong he was "going to be the first to go down." App 429 However, in light of the fact that Wright had sought permission to accompany the marshals when they went to find Kirk Mellott, this statement alone was insufficient to convey to a reasonable person in Wright's position the message that he was not free to leave. Instead, the statement seems to convey the message that a condition of the permission given to Wright to enter a house was that he take the most dangerous lead position when the entry was made.

Wright notes that he "felt a gun in (his) back" as he walked into the house. App. 429. But, in light of the background previously noted, this evidence is also insufficient to convey to a reasonable person in Wright's position the message that he was not free to go. With Wright in the lead and with the marshals following close behind with their guns drawn, it would not be surprising for Wright to feel a gun touch his back even

though he was entering the house voluntarily. Taking the evidence in the summary judgment record as a whole, we hold that there is not enough to show that Wright was seized.

Moreover, even if a reasonable fact finder could conclude that Wright was in fact seized, the defendants would still be entitled to summary judgement based on qualified immunity. A reasonable officer in the position of the marshals could easily have though that a reasonable person in Wright's position - having asked to accompany them, having never expressed a desire to depart or to stay outside the house, and having never been told that he was not free to do so - would not feel that his liberty was restrained.

III

For the reasons explained above, we reverse the district court's denial of the defendants' summary judgement motion, and we remand for the entry of judgment in their favor.

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5. In arguing that Wright's "human shield" claim should be analyzed under Fourth Amendment, rather that substantive due process, standards, the defendants reply brief states that "it is difficult to imagine a more clear allegation of "seizure" of one's person than claiming that a law enforcement officer held one at gun point as a human shield". Reply Br. at 13. We do not interpret this as a concession that Wright was in fact seized. Rather, we interpret this statement to mean only that compelling a person to function as a

human shield would constitute a seizure.

RENDELL, Circuit Judge, dissenting:

The majority conclusion that the conduct in this case was, without doubt, objectively reasonable and not excessive based upon plaintiff's chilling take runs counter to our Fourth Amendment jurisprudence as most recently explicitied in Baker v. Monroe Township, 50 F.3d 1186 (3d Cir 1995) - relied upon by district court but not mentioned in the majority's opinion - and Sharrar v. Felsing, 128 F.3d 810 (3d Cir. 1997). I must part company with my colleagues because I agree with the district court's well-reasoned determination that the issue of reasonableness of the marshals' conduct under the circumstances of this case is properly a question for the jury.

In Baker, we addressed conduct similar to the marshals' actions here, namely the pointing of guns, as well as the use of handcuffs, stating that the use of this type of force must be justified by the circumstances. We noted that "we must look at the intrusiveness of all aspects of the incident in the aggregate." 50 F.3d at 1193. Baker involved a police stop and detention of three individuals entering a residence while the police were conducting a drug raid. The police stopped them, pushed them down to the ground with guns drawn, and handcuffed and detained them for 15-25 minutes. We reversed the district court's grant of qualified immunity because there was sufficient evidence from which a jury could find a Fourth Amendment violation. The police in Baker

admitted that the use of handcuffs would have been "inappropriate" until there was an arrest. We assessed the police conduct in the following terms:

> Here, accepting the Bakers' testimony, the police used all of those intrusive methods without a reason to feel threatened by the Bakers, or to fear the Bakers would escape...the appearances were those of a family paying a social visit...there is simply no evidence of anything that should have caused the officers to use the kind of force they are alleged to have used.

Id. Similarly, in this case, defendant Heemer himself testified in his deposition that pointing a gun at an unarmed person was "absolutely" inappropriate conduct. Further, the marshals encountered a peaceful scene with no indication of resistance of force on the part of the Mellotts, and there is no evidence of anything that should have caused them to use the force indicated here.

The majority distinguishes the instant situation on the basis of the threat to the safety of the officers. However, in reality, a jury might well determine that the likelihood of violence toward the marshals was not so great, given the context of the incident discussed below, and in fact that the only person who had witnessed aggressive behavior on the part of the Mellotts was an agent of the Farmers Home Administration who had been chased off the farm property by Mellott in a pickup truck.

The court's opinion fails to note a few facts which could color a jury's view of the overall atmosphere and context of the incident in question. First, the Mellotts had made themselves notorious for their litigious ways, and they, along with other farmers being counsel by the same advisor, were suing the Farmers Home Administration, This fact was not lost on the marshals effecting the evictions. Nor, I would imagine, were they unaware that the Mellotts were testing the patience of various federal agencies. Furthermore, whatever fear the marshals had to cause them to descend on the Mellott farm with guns blazing was immediately dissipated when they encountered a pastoral scene of several people sitting peaceably in a parlor. While it might have been reasonable for the marshals to approach and enter the home in an aggressive mode, the clearly passive conduct of those present should have caused them to adjust their response to the situation accordingly. Officer Heemer testified specifically that Wilkie Mellott assured him that no one else was int he house and since they knew the marshals were coming, he had removed the guns. The force used thereafter was not clearly, objectively reasonable, and, given our precedent in Baker as a guide, the jury should be the judge of this conduct. I also disagree with the majority's view that Jackie Wright's Fourth Amendment rights were violated as a matter of law as he accompanied the marshals

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1. Mrs. Mellott testified that the bankruptcy judge said he would "make an example" of them.

to Kirk Mellott's house, notwithstanding having a gun in his back and being told he would be first to go down if anything went wrong. I find this situation as presenting at least an arguable seizure, depending upon whose version of the facts the jury believes.

Although the majority analogizes this situation to Sharrar, I submit that the facts in that case are quite different. Sharrar involved the propriety of the arrests of individuals wanted for assault, holed up in a home in an otherwise peaceful seashore community, and the extent of force employed by teams of law enforcement personnel in surrounding the residence and effecting the arrest of these individuals. The majority in Sharrar stated that the Rambo-type behavior under the circumstances came "close to the line," although not constituting a Fourth Amendment violation, 128 F.3d at 822.

Here, where seven marshals detained and terrorized a family and friends, and ransacked a home, while carrying out an unresisted civil eviction, their conduct which could be described as Gestapo-like, is even closer to the line, if not over the line. We should not cloak it in the protective veil of immunity at the summary judgement stage. Just as in Baker, where we reversed summary judgement granting qualified immunity so that a jury could judge the objective reasonableness of the police conduct, here we should affirm the excellent reasoning of the district court, following our precedent in Baker, that genuine issues exist as to the reasonableness of the marshals' behavior. The matter should proceed to trial on the issue of the alleged violations of the

Fourth Amendment rights of all the plaintiffs and the marshals entitlement to qualified immunity. I would affirm.

A True Copy:
Teste:

CERTIFICATE OF SERVICE

I, Don Bailey, hereby certify that I am on this day serving a copy of the foregoing Supplemental Appendix upon the person (s) and in the manner indicated below, service by First-Class Mail, Postage Prepaid, and Addressed as Follows:

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